No. 78-1735

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE FABSTEEL COMPANY OF LOUISIANA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 48a-65a) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 1a-48a) are reported at 231 N.L.R.B. 372.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1979. On February 8, 1979, Mr.

Justice Powell extended the time in which to file a petition for certiorari to May 17, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner was a successor employer obligated to reinstate with backpay certain employees whose rights as unfair labor practice strikers were previously adjudicated in an action against its predecessor.

2. Whether the Board properly found that petitioner, as a successor employer, did not have a good faith doubt as to the union's majority status, and therefore unlawfully refused to bargain with the union as the employees' representative.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-4. The following provision is also relevant:

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization. * * *

STATEMENT

1. In January 1974, the Board certified the United Steelworkers of America, AFL-CIO (the Union) as the collective bargaining representative of a unit consisting of seven plants of the Mosher Steel Company (Mosher). Six of the plants were located in Texas; the seventh was located in Shreveport, Louisiana. In July 1974, the Union began a strike at all seven plants. Sixty-five of Mosher's 67 unit employees at Shreveport joined the strike. Mosher hired 30 replacements at Shreveport, and 21 strikers returned to work during the strike. (Pet. App. 6a-7a.) The strike ended on May 12, 1975, and the remaining strikers made unconditional offers to return; none were reinstated at that time, but prior to December 31, 1975, seven were reinstated (Pet. App. 7a-8a; Tr. 40, 91, 113-115).[1]

In September 1975, the Board found that Mosher had refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act, and that the strike was an unfair labor practice strike that was caused and prolonged by those unfair labor practices. *Mosher Steel Company*, 220 N.L.R.B. 336 (1975). This decision and the accompanying order requiring Mosher to bargain with the Union and to reinstate the unfair labor practice strikers upon their unconditional applications for reinstatement were en-

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[1] "Tr." references are to the transcript of the unfair labor practice proceeding; "GCX" references are to the exhibits introduced by the Board's General Counsel therein.

forced by the court of appeals in May 1976. *Mosher Steel Co.* v. *NLRB*, 532 F.2d 1374 (5th Cir.) (Pet. App. 9a).

In December 1975, petitioner, with full knowledge of the above-described unfair labor practice proceeding, entered into an agreement to purchase the Shreveport plant (Pet. App. 9a-12a; GCX 7, 8, 9, pp. 1-2; Tr. 13). Mosher terminated all 56 of its non-supervisory employees as of December 31, 1975. On January 1, 1976, petitioner commenced its operation at Shreveport and rehired all 56, thus retaining the identical non-supervisory employee complement employed by Mosher (Pet. App. 14a; GCX 3, 4; Tr. 8-9, 72-75, 82, 162-163). The Board found, and petitioner does not now dispute, that those employees "continued doing substantially the same work on the same equipment at the same location"; while some new products were added, "such work is basically the same" as that done by Mosher (Pet. App. 20a, 21a; Tr. 21-25, 68, 70-72, 86, 157-160).

Before the actual transfer of ownership and several days after the transfer, the Union asked petitioner to bargain with it and to reinstate the unfair labor practice strikers pursuant to the Board's enforced order against Mosher. Petitioner refused. (Pet. App. 23a; GCX 6; Tr. 12, 76-77, 94-95.)

2. On these facts, the Board found that petitioner "is a successor employer to the Mosher Steel Company as employer of the Shreveport plant" (Pet. App. 21a), and that petitioner violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the unfair labor

practice strikers and Section 8(a)(5) and (1) by refusing to bargain with the Union (Pet. App. 40a-42a).[2] The Board rejected petitioner's claims that it was not a successor to Mosher and that, in any event, it had a good faith doubt as to the Union's continued majority support at Shreveport. Applying considerations set forth in this Court's decisions and noting that petitioner had been on notice of Mosher's adjudicated reinstatement obligation before it acquired the plant, the Board held that petitioner had succeeded to that obligation (Pet. App. 26a-27a, 36a-38a). The Board also found that petitioner did not have a good faith doubt as to the Union's majority support. It concluded that because 28 of the 56 Mosher non-supervisory employees (whom petitioner had rehired) had been strikers and because petitioner was obligated to reinstate 22 unfair labor practice strikers, it was reasonable to assume that at least 50 employees in a unit of 78 (counting the striker replacements) supported the Union (Pet. App. 27a-30a).

3. The court of appeals enforced the Board's order (Pet. App. 48a-65a). It concluded that, in accordance with the principles enunciated in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 177 (1973), the Board had "properly balanced the equities" in ruling that petitioner's responsibilities as a successor ex-

[2] In its decision and order (Pet. App. 46a-48a), the Board affirmed the findings and conclusions of its administrative law judge and adopted his recommended order, set forth at Pet. App. 1a-45a.

tended to reinstatement of the employees whom Mosher had unlawfully failed to reinstate (Pet. App. 56a-57a). The court further held that petitioner having "chose[n] to hire the identical employee complement" that existed under Mosher, placed itself in the position of a successor employer under *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and thus was obligated to bargain with the Union representing the employees in that unit (Pet. App. 62a). The court agreed with the Board that petitioner could not base a good faith doubt of loss of majority on the fact that only 28 of the 56 employees now working at the plant had ever supported the strike, since petitioner's arithmetic takes no account of the 22 former strikers whom it is required to reinstate (Pet. App. 64a-65a).[3]

ARGUMENT

In *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281 (1972), this Court held that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," the successor

[3] The court of appeals also rejected petitioner's claims that the Board's order was improper because (1) petitioner and Mosher had agreed that Mosher would offer reinstatement at its other plants to Shreveport unfair labor practice strikers; (2) a hardship would be imposed on strike replacements displaced to make room for the 22 unfair labor practice strikers; and (3) the original certified unit encompassed six plants in addition to Shreveport (Pet. App. 57a-59a, 63a-64a).

employer is obligated to bargain with that bargaining agent. In *Golden State Bottling Co.* v. *National Labor Relations Board*, 414 U.S. 168, 184-185 (1973), the Court held that a successor employer who takes over an enterprise with knowledge that its predecessor has unlawfully discharged employees may properly be required to remedy the predecessor's unfair labor practices by reinstating the employees with back pay. This case involves the application of those principles to the facts of this case. That essentially factual issue does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

In any event, those principles were correctly applied here. While, as petitioner observes, a purchaser is not obligated to hire any of the predecessor's employees (Pet. 9), this principle is inapposite. In this case petitioner elected to take over its predecessor's operation intact, including the entire workforce,[4] with full knowledge that the workforce included a substantial number of unfair labor practice strikers who were entitled to reinstatement. In these circumstances, under the principles established in *Golden State, supra*, petitioner was legally obligated to remedy its predecessor's unfair labor practices by reinstating those 22 strikers, even if this meant dis-

[4] By contrast, in *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 260, 264 (1974), the Court held that there was no successorship obligation because the purchaser "hired only nine of the 53 [predecessor] employees * * * [and thus] there was plainly no substantial continuity of identity in the work force hired by [the purchaser] with that of the [predecessor]."

placing some or all of the employees hired as their replacements.

Furthermore, under the principles established in *Burns, supra*, petitioner was obligated to bargain with the Union recently certified under its predecessor. That is so because when those 22 strikers whom petitioner is required to reinstate are included in the bargaining unit along with the strikers who had previously been reinstated by the predecessor, it is clear that the Union continued to represent a majority of the bargaining unit employees.[5]

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[5] Petitioner asserts (Pet. 12) that, since Mosher had other plants, the Board should have required Mosher to offer reinstatement to the Shreveport unfair labor practice strikers at those plants, a remedy suggested in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965). However, in *Darlington* the "plant ceased operations entirely * * * and all plant machinery and equipment were sold piecemeal at auction * * *." (380 U.S. at 266). Here, the plant continued under petitioner essentially as it had under Mosher; accordingly, the legal rights of the workers at the Shreveport plant could be vindicated there and there was no need to resort to the more burdensome alternative of requiring those workers to relocate to Mosher's plants in Texas.

Nor is there merit to petitioner's contention (Pet. 12) that the Board wrongfully "subordinated the rights" of the workers who were hired to replace the unfair labor practice strikers, who would have to be dismissed if necessary to make room for the strikers. As the court below noted, "unreinstated unfair labor practice strikers are entitled to reinstatement regardless of the fact that permanent replacements have been hired. *NLRB* v. *Pope Maintenance Corp.*, 573 F. 2d 898 (5th Cir. 1978)" (Pet. App. 59a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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